Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	WC Docket No. 03-220
For Forbearance Under 47 U.S.C. § 160(c)	)	
From Application of Sections 251(c)(3),(4), and (6)	)	
In New-Build, Multi-Premises Developments	)	

REPLY COMMENTS REGARDING BELLSOUTH'S PETITION FOR FORBEARANCE UNDER 47 U.S.C. 160(c) IN NEW-BUILD, MULTI-PREMISE DEVELOPMENTS

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Cbeyond Communications, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., and TDS Metrocom, LLC (collectively "CLECs"), through undersigned counsel submit their Reply Comments Regarding BellSouth's Petition for Forbearance Under 47 U.S.C. § 160(c) In New-Build, Multi-Premise Developments.

I. THE REQUIREMENTS FOR FORBEARANCE HAVE NOT BEEN MET

As noted in Commenters' initial comments, Section 10(d) requires that before the Commission can forbear from the requirements of Sections 251(c) and 271, those sections must be fully implemented. Numerous commenters concur with Commenters that neither of these Sections are close to being fully implemented.[1] Based on these Section 10(d) requirements alone, the Commission should summarily dismiss BellSouth's Petition.

II. ILECS AND CLECS ARE NOT EQUALLY ABLE TO DEPLOY FIBER TO NEW-BUILD, MULTI-PREMISE DEVELOPMENTS

[1] AT&T Comments at 5-10; MCI Comments at 10; Covad Comments at 10; Allegiance Comments at 3.

The RBOCs assert that ILECs and CLECs "stand on equal footing" with respect to new build, multi-premise developments.[2] A new community development, however, does not magically erase the advantages an ILEC has obtained via decades-long monopoly control of their local exchange markets. In fact, the U.S. Supreme Court in its decision in *Verizon v. FCC* unequivocally rejected the notion that ILECs and CLECs are in the "same shoes." The Court noted that "The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal."[3] The Court chronicled how control over the local exchange gives ILECs a nearly insurmountable advantage:

> A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like. It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses. The incumbent company could also control its local-loop plant so as to connect only with terminals it manufactured or selected, and could place conditions or fees (called "access charges") on long-distance carriers seeking to connect with its network. In an unregulated world, another telecommunications carrier would be forced to comply with these conditions, or it could never reach the customers of a local exchange.[4]

As this Commission noted, "the incumbent LECs still enjoy cost advantages and superiority of economies of scale, scope and ubiquity as a result of their historic, government-sanctioned

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2 SBC Comments at 3, Verizon Comments at 2, Qwest Comments at 5.

3 *Verizon Communications, Inc. et al., v. FCC*, 122 S.Ct. 1646, 1684 (2002) ("*Verizon*").

4 *Verizon,* at 122 S.Ct. at 1661.

monopolies."[5] Thus, a conclusion that CLECs and ILECs stand in the same shoes would require ignoring the tremendous leverage that ILEC control over local exchange facilities provides in both existing and new developments.

ILECs, even in regard to new developments, possess inherent advantages in serving these areas. Unlike CLECs who will have to deploy new fiber facilities, ILECs already have by far the largest network of intracity dark fiber.[6] Thus, ILECs may simply extend dark fiber to these new communities. ILECs already possess rights-of-way access throughout the service area, and relationships with municipalities and other utilities, such that they can more easily access the new community. In addition, an ILEC has existing SONET network deployment so that accessing new communities will be much easier than for the CLEC.[7]

ILECs have failed to demonstrate that CLECs are not impaired in regard to deployment to new facilities. As Commenters noted, the Commission explicitly found that CLECs were impaired in regard to both commercial and residential multiunit buildings which are significant components of these new MPDs.[8] The ILECs attempt to rebut this with statistics of new community developments and the success CLECs have in serving these developments. This evidence, however, does not even rise to the level of the limited, and flawed, data cited by the RBOCs to demonstrate purported CLEC FTTH deployment. No listing of communities or CLECs serving those communities is provided. No data is given as to how many homes and

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5 *UNE Remand Order* at ¶ 86.

6 *Order,* ¶ 312.

7 *See UNE Remand Order*, ¶ 324.

8 Cbeyond, *et al.*, Comments at 4-5.

commercial and residential multi-unit developments in these MPDs are actually passed by CLEC fiber.

In any event, it is clear the ILECs possess advantages in building to new communities. In fact, as Commenters noted, BellSouth was actually described as the "market leader" in regard to MPDs.[9] AT&T noted that many developers often refuse to provide access to CLECs, or only provide access on discriminatory terms.[10] Indeed, it is very telling that the Real Access Alliance ("Real Access"), a coalition of building owners, shopping centers, real estate management companies, and apartments, states that BellSouth continues to dominate the market in its area and that competitive access is needed so that customers in these developments can have a choice of providers and services.[11] One developer, that owns and/or manages 10,000 units in the BellSouth territory, states that less than 5% of those units are served by competitive providers.[12] Real Access also noted that the limited amount of exclusive deals CLECs have with developers should be encouraged because it allows CLECs to build market share such that they can challenge the ILEC market dominance. Real Access notes that forbearance would dim the prospects for these deals as the ILECs would become even more dominant.[13] Real Access also notes that this limited CLEC competition is already fueling the deployment of advanced services

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9 Cbeyond, *et al.*, Comments at 8, *citing, BellSouth Now Wiring New Homes for the Future,* BellSouth Press Release (June 15, 2000).

10 AT&T Comments at 16.

11 Real Access Comments at 3.

12 Real Access Comments at 4.

13 Real Access Comments at 5-6.

to communities which is what the Commission is seeking. This competition has prodded the ILECs to finally provide these services as well.[14]

Based on these intrinsic advantages ILECs possess, the Commission should reject any extension of its FTTH exemption to new and redeveloped communities. The Commission should also summarily reject Qwest's request to remove ILEC status for ILECs serving "an MPD that did not exist at the time Section 251 was adopted in 1996."[15] Qwest's request should be denied on procedural grounds alone as it is seeking relief that goes far beyond the relief sought in BellSouth's forbearance petition.

III. EVEN IF CLECS DID FACE SIMILAR IMPAIRMENT, UNBUNDLING WOULD STILL BE APPROPRIATE

SBC suggests that requiring unbundling of fiber to MPD would be contrary to the instructions from the D.C. Circuit in *USTA,* and Justice Breyer's concurring opinion in *Iowa Utilities Board,* that the Commission avoid the costs of unbundling where it had no reason to think that such unbundling would promote competition. Requiring unbundling of these facilities would be exactly the course of action prescribed by those opinions, however. There is no dispute that these facilities required large fixed and sunk costs, and are also difficult to deploy. The ILECs do not contend that CLECs are not impaired in deploying these facilities but rather contend that ILECs face the same impairment. Thus, under this reasoning, these are exactly the type of hard-to-duplicate facilities the Commission should unbundle.

The sharing of vital, hard-to-duplicate facilities is rooted in both the Act and principles of economic efficiency. As the Supreme Court noted, "entrants may need to share some facilities

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[14] Real Access Comments at 6-7.

[15] Qwest Comments at 4.

that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[16] As the Court went on to add:

> competition as to "unshared" elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly- to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large competitive carrier such as AT & T or WorldCom) seeking to gain toeholds in local-exchange markets, see FCC, Local Telephone Competition: Status as of June 30, 2001, p. 4, n. 13. (Feb. 27, 2002) (485 firms self-identified as competitive local- exchange carriers). Justice BREYER elsewhere recognizes that the Act "does not require the new entrant and incumbent to compete in respect to" elements, the "duplication of [which] would prove unnecessarily expensive," *post,* at ----8. It is in just this way that the Act allows for an entrant that may have to lease some "unnecessarily expensive" elements in conjunction with building its own elements to provide a telecommunications service to consumers.[17]

The Commission itself has noted how the availability of costly-to-duplicate network elements at TELRIC prices could "avoid the risk of keeping more potential entrants out," while "induc[ing] them to compete in less capital-intensive facilities."[18]

In fact, Justice Breyer, who the D.C. Circuit cited extensively in the *USTA* decision, described the philosophy of unbundling as follows:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one

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16 *Verizon,* 122 S.Ct. at 1672, n. 27.

17 *Id.*

18 Petition of Federal Communications Commission for Rehearing or Rehearing *En Banc* at 9, *United States Telecom Assn. v. FCC*, Nos. 00-1012, *et al.*, and 00-1015, *et al.* (D.C. Cir. July 8, 2002) ("*FCC Petition for Rehearing*").

> might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition . . . .[19]

Thus, the Commission must consider if the particular element at issue is, in the words of the Supreme Court, "unnecessarily expensive" to duplicate. It is clear that these elements would be hard-to-duplicate for CLECs. The Commission noted that fiber loops, as with other loops, are the exact type of "very expensive to duplicate facilities" that ILECs are required to unbundle. *Order* ¶205.

It is worth noting that the European Union ("EU") reached a similar conclusion regarding "hard to duplicate" facilities through its adoption of a Regulation for unbundled access to the local loop ("ULL Regulation").[20] The ULL Regulation is directly applicable law in all EU Member States. According to Recital 13 of the ULL Regulation, its goal is to enable "the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet." The EU has recognized in its ULL Regulation that "it would not be economically viable for new entrants to duplicate" an ILEC's local access infrastructure. "Alternative infrastructures", the EU states, "such as cable television, satellite, wireless local loops do not generally offer the same functionality or ubiquity for the time being." The EU concludes that all regulators should actively intervene to push for unbundling "on [their] own initiative in order to ensure fair competition, economic efficiency and maximum benefit for

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[19] *Iowa Utilities Board*, 525 U.S. at 416-417 (Breyer, J., concurring in part/dissenting in part).

[20] Regulation (EC) No 2887/2000 of 18 December 2000, EU Official Journal, OJ L 336, 12/30/2000, p.4.

end-users."[21] Continuing the unbundling requirements in regard to MPDs, thus, is not only the correct legal choice but the correct economic and policy choice as well.

IV. THE COMMISSION SHOULD NOT EXTEND THE FTTH EXEMPTION TO ANY LOOP SERVING MULTIUNIT PREMISES INCLUDING THOSE WITH INSIDE COPPER WIRING

Verizon echoes BellSouth's call to extend the FTTH exemption to fiber loops serving multiunit premises even when the inside wiring is copper. Verizon argues that if the inside copper wiring is controlled by the ILEC, the inside copper wiring could be construed to be part of the loop. In fact, Verizon is correct that the inside copper wiring would be part of the loop. The Commission defines the local loop network element as a "transmission facility between a distribution frame . . . and the loop demarcation point at an end-user customer premises."[22] Thus, if the loop demarcation point is at the end-user customer premises, the inside copper wiring leading to the end user is unequivocally part of the loop. The loop, therefore, by definition cannot be considered to be a FTTH loop. In addition, the fact that there may be a significant amount of copper wiring within the multi-unit premises before the end user is accessed makes it very unlikely that the services that FTTH will purportedly support would be feasible over these loops.

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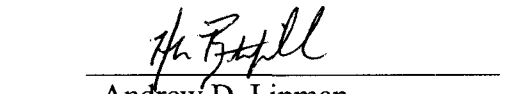
[21] Recital 6 of the ULL Regulation.

[22] 47 C.F.R. § 51.319(a).

V. CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's Petition for Forbearance.

Respectfully submitted,



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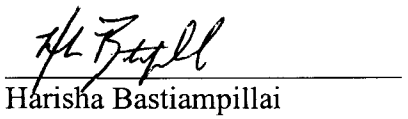
November 25, 2003

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on November 25, 2003, I caused to be served upon the following individuals the Reply Comments Regarding BellSouth's Petition for Forbearance Under 47 U.S.C. § 160(c) in New-Build, Multi-Premise Developments in WC Docket No. 03-220.



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